UNITED ASIAN BANK BHD.

v.

NAGINDAS KARAMCHAND DOSHI KARAMCHAND DOSHI

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[CIVIL SUIT NO. C664 OF 1982]
20 APRIL 1990

CONTRACT: *Performance bond/guarantee - Letter of credit - Provision of rate of interest - Whether can amend or alter - Interpretation of terms - Knowledge of fraud - Standard of proof required.*

CIVIL PROCEDURE: *Summary judgment - Valid defence of fraud - Documentary evidence triable issue.*

The defendant was a customer of the plaintiff bank and carried on the business of buying goods shipped from overseas. The plaintiff, on the defendant's request, agreed to make payments in respect of the goods bought by the defendant by way of letters of credit.

The plaintiff is claiming monies owed plus interest in relation to an overdraft account and trust receipts. The defendant contended firstly that based on the terms of contract (contained in a letter dated 22 February 1980) between the parties, the plaintiff was claiming a rate of interest higher than that stated in the contract and secondly that the plaintiff knowingly made payments on forged bills of lading. The Registrar refused to order that the plaintiff be at liberty to enter final judgment against the defendant, the plaintiff hence appeals that decision.

Held:

[1] Reading the contract as a whole, the plaintiff was entitled to amend or alter the interest rates specified in the contract from time to time.

[2] From the documentary evidence adduced to the Court, the Court found that there is evidence of fraud in respect of the shipping documents and in respect of the shipment of the goods. The plaintiff was duly informed of the alleged fraud but they chose to ignore it and refused to accede to the defendant's request to inform the confirming bank to stop payment.

[3] This is not a proper case for summary judgment as the question of fraud raises a triable issue which can only be decided at the trial.

[Appeal dismissed with costs.]

Cases referred to:

Edward Owen Engineering Ltd. v. Barclays Bank International Ltd. [1978] 1 All ER 976
United Trading Corporation SA and Murray Clayton Ltd. v. Allied Arab Bank Ltd. [1985] 2 Lloyd's Rep 554
Bolivinter Oil SA v. Chase Manhattan Bank [1984] 1 All ER
Power Cuber International Ltd. v. National Bank of Kuwait [1981] 3 All ER 607
European Asian Bank AG v. Punjab and Sind Bank [1983] 2 All ER 508

For the plaintiff - Joginder Singh; M/s. Joginder Singh
For the defendant - V.P. Pradhan; M/s. Skrine & Company

JUDGMENT

Zakaria Yatim J:

This is an appeal by the plaintiff against the decision of the Registrar given on 12 May 1983 refusing to order that the plaintiff be at liberty to enter final judgment against the defendant for the amount claimed in the statement of claim and costs. After hearing the submissions of both Counsel for the plaintiff and the defendant in chambers, I dismissed the appeal with costs. At the request of the solicitors for the plaintiff, I adjourned the matter into open Court for further arguments.

The plaintiff is a bank carrying on business at No. 19, Jalan Melaka, Kuala Lumpur. The defendant was at all material times a customer of the plaintiff. The defendant carried on the business of buying goods shipped from overseas. The plaintiff agreed to make payments, at the request of the defendant, in respect of goods bought by the defendant up to the limit of RM300,000 by way of letters of credit.

The plaintiff's claim against the defendant was for a sum of RM334,622.81. According to the plaintiff this sum was payable by the defendant to the plaintiff being money lent by the plaintiff to the defendant at the defendant's request. In the statement of claim the plaintiff averred that the defendant owed the plaintiff RM143,422.27 plus interest at the rate of 14.5% per annum from 30 January to date of payment in respect of an overdraft account; and a sum of RM163,332.55 plus interest at the rate of 17% per annum from 1 February 1982 to date of payment in respect of trust receipts.

The plaintiff's application was supported by an affidavit affirmed on 21 May 1982. The affidavit in support merely repeated what was stated in the statement of claim and did not exhibit any documentary evidence.

The defendant opposed the application in an affidavit affirmed on 3 September 1982. With regard to the overdraft facilities, the defendant referred to the terms of the contract between the plaintiff and the defendant as contained in a letter dated 22 February 1980 (the contract) exhibited to the defendant's affidavit. The defendant averred that the plaintiff was claiming a rate of interest higher than what was agreed upon in the contract. According to him the contract stated the rate of interest for LCTR at 9½% or 2% above prime rate whichever was higher and for TRC at 10% or 2% above prime rate whichever was higher at the material.

The defendant further averred that on his instructions, the plaintiff issued letters of credit relating to consignments of goods from New Jersey. The drafts drawn against these letters of credit were to be paid 120 days after sight. According to the defendant, the bills of lading relating to the shipment of the goods were forged documents. He alleged that the plaintiff was aware that the two bills of lading were forged. The defendant stated that on 10 October 1980 he notified the plaintiff that the bill of lading relating to the third shipment of goods was forged and that payments should not be made without inquiry. He further stated that he was not liable to pay any amounts due as a result of payments made against the drafts drawn on the letters of credit issued as the plaintiff was aware of the forged bills of lading prior to the maturity of the drafts and as the plaintiff failed in its duty to notify the confirming bank in the United States.

It appears from the defendant's affidavit he was (1) disputing the rates of interest fixed by the plaintiff; (2) alleging that the plaintiff knowingly acted on forged bills of lading. I shall first consider the question of interest.

It was not in dispute that the contract entered into between the plaintiff and the defendant is contained in a letter dated 22 February 1980 from the plaintiff to the defendant.

The letter stated that for letters of credit and trust receipts (LCTR) the interest was at 9½% or 2% above prime rate whichever was the higher. For trust receipt credit (TRC) the interest rate was at 10% or 2% above prime rate whichever was the higher. For cash credit, the interest rate was at 2% above interest rate payable on fixed deposit rate or 7½% whichever was higher. In the statement of claim the plaintiff claimed: (a) interest in respect of the overdraft account at the rate of 14.5% per annum from 30 January 1982 to date of payment and (b) interest in respect of the trust receipts at the rate of 17% per annum from 1 February 1982 to date of payment. It is clear that the plaintiff was claiming interests in the statement of claim at rates higher than the interest rates stated in the contract.

Mr. V. Pradhan, Counsel for the defendant contended that the contract did not give the plaintiff the right to alter the interest rates. The plaintiff however argued that the contract allowed them to vary the interest rates from time to time. I am inclined to accept the plaintiff's argument. The contract expressly stated:

> We are pleased to inform you of having approved the undermentioned renewed limits in your favour subject to the amended terms and conditions and subject to our usual discretion to amend, alter or withdraw without notice.
> (Emphasis added).

In their affidavit affirmed on 17 November 1982 the plaintiff stated that they had sent out notices to the defendant from time to time informing him of the changes in the rates of interest that they would be charging him in respect of the credit facilities granted to him. Copies of the letters written by the plaintiff to the defendant were exhibited to the affidavits. In these letters the defendant was informed of the increase in the interest rates from time to time and that the increase was mainly due to the increase in the prime lending rate or the minimum lending rate of the plaintiff. Mr. Pradhan argued that "the discretion to amend, alter or withdraw without notice" was restricted to "limits" and "amended terms and conditions". According to him the stipulation as to interest was not subject to amendment, alteration or withdrawal.

In my opinion the contract should be read as a whole. The interest rates specified in the contract were related to the "nature of limit" or the facilities granted by the plaintiff to the defendant as stated in the same contract. In my view the plaintiff was entitled to amend or alter the interest rates specified in the contract from time to time. The plaintiff was therefore entitled under the contract to claim the interest rates as in the statement of claim.

I now turn to the allegation of fraud by the defendant.

In his affidavit affirmed on 3 September 1982 the defendant averred that on his instructions, the plaintiff issued three letters of credit relating to consignments of goods from one U-Teck Supplies Inc. New Jersey, USA. The first letter of credit dated 14 February 1990 was for a sum of US$9,500. The second letter of credit, also dated 14 February 1980 was for a sum of US$12,325. The third letter of credit, dated 14 March 1980 was for US$30,000. The drafts drawn against these letters of credit were to be paid 120 days after sight. The bill of lading relating to the shipment of goods in respect of the first letter of credit was released by the plaintiff against trust receipts signed by the defendant on 25 April 1980. The bill of lading relating to the shipment of goods in respect of the second letter of credit were released on 9 May 1980. Both bills of lading were dated 14 April 1980. The defendant alleged that on or about 30 July 1980, on his instruction the plaintiff issued a bank guarantee through their agent, the United Commercial Bank in Singapore to enable the defendant to take delivery of goods landed in Singapore from the vessel "Korean Leader." According to the defendant, it was necessary to have the guarantee because the two bills of lading did not tally with the

goods landed in Singapore as they were forged. The defendant further alleged that the plaintiff, by issuing the bank guarantee acknowledged their acceptance of the fact that the two bills of lading were forged. The defendant averred that the forgeries of the bills of lading were discovered prior to the dates of maturity of the drafts relating the bills of lading. According to the defendant, the plaintiff should have notified the confirming bank, the Manufacturers Hanover Trust in New York of the forgeries of the bills of lading and should have requested the said bank not to pay the drafts upon their maturity; but the plaintiff failed to do so. The defendant further averred that with regard to the shipment of goods in respect of the third letter of credit, the bill of lading was forged. He added that the plaintiff failed to take steps to notify the confirming bank of the allegations of fraud. The bill of lading was released on 11 July 1980.

Mr. Pradhan, in his submission said that by comparing the two sets of documents exhibited to the defendant's affidavits, one would conclude that there was evidence of forgery.

The plaintiff, in their affidavit affirmed on 17 November 1982 denied the allegation that the bills of lading were forged documents. The plaintiff averred that their duty was to scrutinize the bills of lading and to see if the same complied with the terms of the letters of credit opened by the plaintiff on the instructions of the defendant. If the plaintiff was satisfied after scrutinising the documents, the plaintiff must pay the amount to the confirming bank in USA. The plaintiff averred that there was no truth in the defendant's allegation that the bills of lading were forged.

It is now necessary for me to examine the bills of lading and other relevant documents to determine whether there is any evidence to support the allegation that the bills of lading were forged.

The defendant exhibited two bills of lading dated 14 November 1980. In both these bills of lading, the shipper was U-Teck Office Systems Ltd., Mahwah NJ. The vessel in which the goods specified in the bills of lading were shipped was the "Korean Leader." The total weight of goods in the two bills of lading was 42,090 lbs. and the number of the container was LLCU4220822 bearing seal number 18168. Mr. Pradhan compared these two bills of lading with another set of documents marked as Exhibit "C" to the defendant's affidavit affirmed on 19 September 1983. I find in these set of documents, three documents, together with letters. The first document belongs to "Orient Overseas Container Line." It was in the form of a bill of lading but it did not bear a document number. The container referred to in the two bills of lading contained 210 drums, but the document of the Orient Overseas Container Line stated that the container contained 352 drums with a gross weight of 14,520 kilogrammes. The shipper's name in that document was B. GL. Bwherece Ltd. and the vessel's name was "Korean Leader." The container number was 00LM4750654 and the seal number was 1286629. The document states that the port of loading was St. John, N.B. The container described in that document was discharged from the vessel on 30 May 1980 at the Port of Singapore. The shipping agents representing the defendant in Singapore was Jardine Shipping Agencies. In a document prepared by the shipping agents dated 31 July 1980, which was addressed to the Singapore Port Authority it was stated that the cargo discharged from the Korean Leader was to be delivered to Jardine Shipping Agencies as agents of the defendant. The document also described that there was only one container and the container number was DOLM470 654 bearing the seal number 010937. The weight of the drums was 1600 kilograms. It will be noted that the seller in the two bills of lading dated 14 November 1980 was U-Teck Office Systems Ltd. USA. In the document of Orient Overseas Container Line, the seller was BGL Brokerage

Ltd., Montreal. The port of loading was also different. Furthermore the seal number in the document of Orient Overseas Container Line did not tally with the seal number as stated by the defendant's agents in Singapore.

From the documentary evidence described above I find that on the facts of this case there is evidence of fraud. This conclusion is further supported by the letters exhibited by both the defendant and the plaintiff.

The defendant, in his affidavit affirmed on 19 September 1983 averred that his goods were also shipped in the vessel, "Pan American." The defendant, however did not exhibit the bill of lading in respect of this shipment. It appears that the defendant had sent to Hartford Insurance Connectictut a copy of a Pan American Container Lines bill of lading issued by one TNT Marine Ltd. showing a shipment of 300 drums of Isopar. Hartford Insurance acknowledged receiving the bill of lading but upon their investigations the vessel "Pan American" was not in existence. The letter is reproduced below:

> Soutra Trading Corporation,
> P.O. Box 224,
> Jalan Sultan,
> Petaling Jaya,
> Malaysia.
>
> **Attention of Mr. B.K. Doshi**
>
> Dear Sirs,
>
> We must unfortunately advise you that we are denying coverage in this matter in that our investigation has revealed that the cargo for which you are claiming indemnity from us was never shipped. In effect, you have provided us with a Pan American Container Lines bill of Lading No. 2 issued by TNT Marine Ltd. showing the shipment of 300 drums of Isopar. The bill of lading further shows that the cargo was loaded at Montreal. Our reasons for denial are as follows:
>
> 1) The Port of Montreal authorities have no record of a vessel called Pan American having loaded cargo at the relevant period;
>
> 2) Various inquiries made on our behalf are to the effect that no vessel called Pan American was in existence at the relevant time;
>
> 3) Our inquiries have not been able to discover the existence of TNT Marine Ltd. who allegedly issued the bill of lading.
>
> In view of the foregoing, we must unfortunately deny coverage. However, should you be able to provide us with additional evidence, we shall gladly reopen our file.
>
> Yours very truly,

In a letter to the American Insurance Company dated 9 September 1980, the defendant *inter alia* stated:

> (1) The goods shipped under our Invoice Ref. No. 2233 and insured under Marine Insurance Policy Ref. No. 13 CO 750086 - 000077, only the delivery order for the 71 Drums was issued by the local carrier's agent as per attached photostat copy. Though 72 drums were found from the said Container No. 0018 4750654 as per amended B/L issued by Dart Container Line Ltd. on behalf of Orient Overseas Container Line at Montreal but as one drum found to be empty and therefore the delivery order was made out for the exact intact quantity for the custom formality which please note.
>
> (2) The goods shipped under our supplier's Invoice Ref. No. 2234 and insured under Marine Insurance Policy Ref. No. 13 CO 750086 - 000078, we have not received the whole consignment.

(3) The goods shipped under our supplier's Invoice Ref. No. 2239 and insured under Marine Insurance Policy No. 13 CO. 750086 - 000081, we have not received the whole consignment until now.

As per our supplier's Invoices Ref. Nos. 2233 & 2234, the goods were shipped per s.s. 'Korean Leader' under 2 separate B/L and the whole consignments against these 2 invoices were stuffed into one container Ref. No. LICU 4220822 - Seal 18168 and 2 separate B/L were issued against these 2 invoices to Messrs. BGL - 300 Rue St. Sancriment, MTL., Que. 12y144 by Messrs. J & J Marine Ltd., general agents on behalf of Dort Container Line at Montreal, Canada. But unfortunately an amended B/L was issued from the port of loading for these whole consignments and the container was also changed but the goods were shipped per s.s. "Korean Leader".

As we don't have the original or copy of the said amended B/L, we have requested the local carrier's agent to favour us with the photostat copy of their amended B/L so as to enable us to clear the goods from the port. Later upon the receipt of the copy of the said amended B/L, we have noticed that there was not only discrepancy in the B/L in respect of the quantity which was contrary to the original B/L (2) but also stated that '**All Charges Collect**'. We arranged to take delivery on banker's shipping guarantee and on the payment of the freight charges including all the port charges for late clearing the goods. The necessary shipping guarantee is being issued by our banker only for the quantity delivered to us by the local carrier's agent. The reason for doing so is that as there was discrepancy in the said amended B/L and not taking any further risk, have agreed with the carrier's agent for the shipping guarantee which will be issued by our banker on the condition that "**Shipping Guarantee Will Be Only Issued After Examining And Checking The Contents Of The Said Container Ref. No. OCLD 4750654 - Seal 1286629 Arrived Per S.S. "Korean Leader.**" Such being the case, our claim under claim bill Ref. No. DTC/USA/1&2/80 is in respect of the balance of the goods which we have not received until now as per invoice Ref. No. 2233 and 2234. We have already written to Messrs. BGL at Montreal as per copy enclosed.

Finally, the goods shipped per s.s. "Pan American" which belong to the Pan American Container Line, under B/L No. P/A - C -110/Singapore-1, under our supplier invoice Ref. No. 2239, the whole consignment of 300 Drums - 208 litres each has not arrived till now. As we are not, who are the local carrier's agent at Singapore? We have also stated these facts in our letter written to Messrs BGL to their forwarding agent at Montreal, Canada. Since writing this letter, so far, we have no news of whereabouts of our goods shipped by our supplier under their invoice Ref. No. 2239, and have no alternative but to forward our claim for non-delivery basis as per attached claim bil Ref. No. STC/USA/3/80.

U-Teck Co., which was the shipper, in the two bills of lading dated 14 November 1980 wrote to the confirming bank in New York on 19 October 1989 admitting that there were errors in documentation regarding the shipment of the goods. The letter stated:

Per my customer's letter, there has been a problem in releasing the goods because of **errors in documentation**, which we agree on and are presently correcting.
(Emphasis added).

The defendant did not receive the goods except the seventy-two drums. In his letter to the plaintiff dated 11 September 1980, the defendant stated:

Re: Your L/Cs Ref. Nos. ULO16-057, 58 and 158/80 in favour of Messrs. U. Teck Office System Ltd.

We would like to inform you that the shipment which have been effected under the above 3 L/Cs. but unfortunately we have not received the goods worth US$44,725 until now. Therefore, we have already filed the necessary claims against the underwriters local claim handling agent as per enclosed copy.

We do hope that the same will be in order and we will let you know the outcome of these 3 claims which please note and oblige.

In another letter to the plaintiff dated 10 January 1981, the defendant wrote:

In this connection I wish to refer to my telex from Canada, informing you not to release the amount against L/C Ref. No. UL016-115/80. This L/C was opened on your principal Manufacturers Hanover Trust Co. New York favouring Messrs. U. Teck Office System Ltd., Mahwah, N.J. at 120 days after sight. The amount was supposed to be released on 27 October 1980 as per terms of letter of credit.

Bill under this L/C was accepted by me on or about 11 July 1980. After a period of nearly ninety days the goods had not arrived, and I became a little upset over the delay, and decided to go to Canada/USA to see for myself the reason for the delay. To my surprise it was discovered that the sub-contractor (i.e. Canadian office) of my supplier had falsified all documents from Canada and the L/C was negotiated by M/s. U. Teck Office System Ltd. from U.S.A. Immediately when these facts came known to me I telexed your office, and also wrote you a letter about alleged fraud. I had also informed my solicitors to inform you of the situation.

From the documentary exhibits and from the affidavits, it appears that there is evidence of fraud in respect of the shipping documents and in respect of the shipment of the goods.

On 10 October 1980, the defendant sent a telex to the plaintiff informing them that the documents were not genuine and asked the plaintiff to stop payment. The telex reads:

Attn: Manager
Jalan Malacca Branch
Kuala Lumpur
Documents drawn under our No. ULO-16-57/80, ULO-16-58/80 and ULO 16-115-80 by beneficiaries are not genuine. Inform your corresponding bank immediately to stop payments for our outstanding above letter of credit. Letter follows from forwarding agent BGL 300 ST-Sacrement St. Suite 135.

Regards
Mr. Doshi
Unisia MA31145.

On 13 October 1980 the solicitors for the defendant wrote to the plaintiff. The letter *inter alia* states:

We act for Messrs. Soutra Trading Corporation, the consignees of 200 drums of Esso Isopar G and 100 drums of Esso Isopar II, totalling to a value of US$30,000. We also refer to LC No. ULO 16-115/80 wherein the consignees had opened letters of credit in favour of the consignors, Messrs. U-Teck Office System Ltd. U.S.A.

We wish to request yourselves to stop payments with regards the above transaction as we are suspicious of alleged fraud. We also take this opportunity to bring your attention to the telex sent by Mr. Doshi on 10 October 1980, which clearly indicates that the beneficiaries are not genuine. In fact from our investigations it appears that goods have not been shipped yet.

In view of the above could you kindly stop payments with regards the above transactions.

The plaintiff had ample time to stop payment. Indeed in the letter from U-Teck Company to the collecting bank, it was stated:

Reference, Manufacturer advice # 502055 Issuing Bank, United Asian Bank, Malaysia, # ULO16-115/80.

Dear Mrs. Catanzaro,

In regard to the above captioned L/C, please be advised that we are requesting an additional extension of the maturity of this credit for 120 days. Of course U-Teck will pay all additional discount charges, fees, etc. concerning this request.

Despite the fact that the plaintiff was informed that there might be fraud in the shipment of the goods and the plaintiff was requested to stop payment and despite the fact that the plaintiff had ample time to stop payment, the plaintiff decided to ignore the request. In their letter dated 13 October 1980 the plaintiff wrote to the defendant as follows:

Dear Sir,

Re: Documents under Letter of Credit.

We refer to the documents received under letters of credit reference 57/80, 58/80 and 115/80 and also to the telex of Mr. Doshi.

You will no doubt appreciate that as a bank we deal in documents and not in goods and in view of the fact that the documents presented under the letter of credit were found to be correct as evidenced by the negotiating bank in USA we are in a position to assist you in this matter though we would only be pleased to assist you in whatever manner possible.

Under these circumstances we are obliged to honour our commitment under the letter of credit and you are kindly requested to fund your account accordingly. You may however note that the correct remedy for you is against the seller for any breach of contract that may be the evident cause for the various factors pointed out by you during the discussions and as well as *vide* your letters.

We trust we have clarified the matter to you many times earlier and have now placed on record the position of the bank.

Your faithfully,

Sgd/-
(Malkir Singh)
Manager.

It is now necessary to examine the relevant authorities in order to ascertain the law governing this matter.

In *Edward Owen Engineering Ltd. v. Barclays Bank International Ltd.* [1978] 1 All ER 976 the English Court of Appeal decided that where a bank had given a performance guarantee, which was similar to a confirmed letter of credit, it was required to honour the guarantee according to its terms and was not concerned whether either party to the contract which underlay the guarantee was in default. The only exception to that rule was where fraud by one of the parties to the underlying of contract had been established and the bank had notice of the fraud. In that case, Lord Denning MR, in his judgment at p. 983 said:

All this leads to the conclusion that the performance guarantee stands on a similar footing to a letter of credit. A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee on demand if so stipulated, without proof or conditions. The only exception is when there is a clear fraud of which the bank has notice.
(Emphasis added).

In the same judgment Lord Denning MR said that "... the bank ought not to pay under the credit if it knows that the documents are forged or that the request for payment is made fraudulently in circumstances when there is no right to payment ..."

In *United Trading Corporation SA and Murray Clayton Ltd. v. Allied Arab Bank Ltd.* [1985] 2 Lloyd's Law Reports 554, Ackner LJ, as he then was, described *Edward Owen* case *supra* as "... the *locus classicus* for the proposition that a performance bond, standing on a similar footing to a letter of credit, obliges a bank to honour it according to its terms, unless it has notice of clear fraud committed by the beneficiary ...

The question for the Court to consider now is what is the standard of proof required when there is allegation of fraud. In *Edward Owen* case Lord Denning MR said there must be "... a clear fraud of which the bank has notice." In *Bolivinter Oil SA v. Chase Manhattan Bank* [1984] 1 All ER, Sir Johon Donaldson MR said that where a demand made for payment under an irrevocable letter of credit was fraudulent, ".. .the evidence must be clear, both as to the fact of fraud and as to the bank's knowledge." He added that it would not be sufficient on the uncorroborated statement of the customer, for irreparable damage would be done to the bank's credit. In the *Allied Arab Bank* case *supra*, the standard of proof was discussed at length by Ackner LJ in his judgment at pp. 560-561:

> The respondent banks accept for the purposes of this appeal that the fraud exception exists. They point out, however, that it has never been successfully invoked in practice because of the heavy burden of proof. They contend that this is because proof of facts which, in the absence of explanation, would ordinarily establish fraud is not sufficient unless every possibility of an innocent explanation is excluded. They submit that the Courts will accordingly speculate whether an innocent explanation is possible, and will usually not infer fraud from mere silence in the face of the accusation.
>
> In our judgment the respondents are overstating the standard of proof. The evidence of fraud must be clear, both as to the fact of fraud and as to the bank's knowledge. The mere assertion or allegation of fraud would not be sufficient ... We would expect the Court to require strong corroborative evidence of the allegation, usually in the form of contemporary documents, particularly those emanating from the buyer. In general, for the evidence of fraud to be clear, we would also expect the buyer to have been given an opportunity to answer the allegation and to have failed to provide any, or any adequate answer in circumstances where one could properly be expected. If the Court considers that on the material before it the only realistic inference to draw is that of fraud, then the seller would have made out a sufficient case of fraud.
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> While accepting that letters of credit and performance bonds are part of the essential machinery of international commerce (and to delay payment under such documents strikes not only at the proper working of international commerce but also at the reputation and standing of the international banking community), the strength of this proposition can be over-emphasized ... It is interesting to observe that in America, where concern to avoid irreparable damage to international commerce is hardly likely to be lacking, interlocutory relief appears to be more easily obtainable. A temporary restraining order is made essentially on the basis of suspicion of fraud, followed some months later by a further hearing, during which time the applicant has an opportunity of adding to the material which he first put before the Court. Moreover, their conception of fraud is far wider than ours and would appear to include ordinary breach of contract.

Ackner LJ then referred to the American cases and went on to state in his judgment:

> These cases appear to indicate that, for the purpose of obtaining relief in such cases, it is not necessary for an American plaintiff to demonstrate a cause of action against a bank, whereas it is, as previously stated, common ground that a plaintiff must in this country show a cause

> of action. There is no suggestion that this more liberal approach has resulted in the commercial dislocation which has, by implication at least, been suggested would result from rejecting the respondent's submissions as to the standard of proof required from the plaintiffs. Moreover, we would find it an unsatisfactory position if, having established an important exception to what had previously been thought an absolute rule, the Courts in practice were to adopt so restrictive an approach to the evidence required as to prevent themselves from intervening. Were this to be the case, impressive and high-sounding phrases such as "fraud unravels all" would become meaningless.

It will be noted that *Edward Owen* case, *Allied Arab Bank* case and *Bolivinter v. Chase Manhattan Bank*, dealt with the question whether a plaintiff should be granted an injunction to restrain a defendant from paying on a letter of credit or a performance guarantee. In my view the principles enunciated in those cases apply to cases where an order for summary judgment is sought by the plaintiff. Accordingly, where a valid defence of fraud was raised, summary judgment should be refused and the defendant should be given unconditional leave to defend the action.

In *Power Cuber International Ltd. v. National Bank of Kuwait* [1981] 3 All ER 607, the English Court of Appeal upheld the decision of the learned Judge in giving summary judgment for the plaintiff. In that case the Court of Appeal decided that the National Bank of Kuwait was in default in that they had promised to pay the sums due under a letter of credit at maturity but they did not pay those sums. In that case, Griffiths LJ, in his judgment at p. 614 said:

> I have no doubt that we should uphold the obligation to pay under the irrevocable letter of credit ... Letters of credit have become established as a universally acceptable means of payment in international transactions. They are regarded by merchants the world over as equivalent to cash; ... The banker's promise to pay the seller is wholly independent of the underlying contract of sale between the seller and the buyer, or of any other contractual dispute that may arise between them. The whole purpose of this form of payment is that a seller should not be kept out of his money by litigation against him at the suit of the buyer. *In the absence of fraud the seller is entitled to be paid on presentation of genuine documents ... There is no suggestion of fraud and, in the absence of fraud, an English Court would not have interfered with the banker's obligation to pay under the letter of credit ...*
> (Emphasis added)

In *European Asian Bank AG v. Punjab and Sind Bank* [1983] 2 All ER 508, the English Court of Appeal decided that there was, on the face of the documents a liability on the defendants to pay the plaintiffs the sum due under a letter of credit on the date due; and since there was no arguable defence judgment was entered for the plaintiffs. In that case the issue of fraud was raised in the defence. The Court decided that on the facts of that case, the issue of fraud was not material before the Court.

In the present case, the allegation of fraud by the defendant was strongly corroborated by the documentary evidence discussed earlier. On the evidence before this Court, the defendant had made out a sufficient case of fraud. The plaintiff was duly informed of the alleged fraud but they chose to ignore it and refused to accede to the defendant's request to inform the confirming bank to stop payment. I should mention here that the defendant was not alleging fraud against the confirming bank in New York.

In my opinion, this is not a proper case for summary judgment. From the facts of this case the question of fraud raises a triable issue which can only be decided at the trial.

For the reasons stated above I confirm the order I made in chambers with costs to be paid to the defendant.

Also found at [1990] 2 CLJ 721